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# INTERNATIONAL HUMAN RIGHTS LAW AND CONSTITUTIONAL RIGHTS: IN FAVOUR OF SYNERGY

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## ABSTRACT

*This paper is concerned with demonstrating the capacity of international human rights law and domestic constitutional law to have a synergistic relationship that is focused on the ways in which the two sets of standards can be harmonised rather than on questions of 'superiority' and 'inferiority'. Conceiving of the relationship between the two bodies of law in this way requires us to recognise their shared dignitary core and the optimal effect of international human rights law, namely effective rights-protection at the domestic level with international law playing a subsidiary role. This paper uses the example of LGBT rights in European Convention on Human Rights jurisprudence to demonstrate such a synergistic relationship and argues that such a relationship is possible as between US constitutional law and international human rights law notwithstanding some prima facie barriers thereto.*

## 1. INTRODUCTION

It is sometimes said that the United States has a particular antipathy to international law and internationalism; that it neither 'gets it' nor wants to 'get it'.<sup>2</sup> This, in my view, is a misrepresentation of the position of the United States in respect of international law generally, although it is perhaps somewhat closer to the truth in relation to international human rights law than in other areas.<sup>3</sup> This representation of the United States' alleged

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<sup>1</sup> (BCL, LL.M., Ph.D (NUI)); Lecturer, UCD School of Law. This paper was begun for a presentation at a conference entitled, 'Civil Rights in the Obama Era' at Valparaiso University School of Law. I am grateful to Professor Penelope Andrews for the invitation to participate and to all who attended for their comments and observations. Editor's note: The spelling in this article is based on the European English model, not the American version.

<sup>2</sup> Peter Spiro, *The New Sovereignists: American Exceptionalism and its False Prophets* 79 FOREIGN AFFAIRS 9 (2000)

<sup>3</sup> I have previously classified the United States Supreme Court as *à la carte* internationalist. See Fiona de Londras, *Dualism, Domestic Courts and the International Rule of Law* in IUS GENTIUM: THE RULE OF LAW IN COMPARATIVE PERSPECTIVE (Mortimer Sellers and Tadeusz Tomaszewski, eds, 2010). In relation to international human rights law and treaties, however, the United States has traditionally shown reluctance to effectively bind itself to such treaties either by non-ratification or, where a treaty is ratified, by non-incorporation and the express designation of a treaty as non-self-executing and therefore not incorporated into law by the Supremacy Clause of the Constitution. See Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties* 1 CHINESE JOURNAL OF INTERNATIONAL LAW 347 (2000). For an overview of the

relationship with international law reflects the fact that both the US and a substantial portion of the international legal community are engaged in a process of mythologizing in relation to one another that perhaps reaches its zenith when it concerns international human rights law. The United States is mythologized as an isolationist and anti-internationalist legal system,<sup>4</sup> while international human rights law is mythologized as a top-down, 'un-American', and anti-democratic enterprise.<sup>5</sup>

The first step for anyone concerned with highlighting the potential for international human rights law to play a valuable role in rights-related litigation in the United States is to 'myth-bust' in both directions. In this article I intend to argue that in fact United States constitutional civil rights law and international human rights law share a common core of values and purposes that make them the ideal theatre in which synergistic and catalytic interaction between domestic and international law can take place. This is, indeed, the type of relationship between domestic and international law that is foreseen and intended by international human rights law and has happened in other jurisdictions and contexts, such as in relation to LGBT rights in (Western) Europe.

I do not intend to argue that international human rights law is binding in domestic law. The status of international human rights law in domestic legal systems is a matter for those systems themselves. Under US constitutional law international human rights law is part of federal common law inasmuch as it is customary international law and reliant on incorporation inasmuch as it is contained in non-self-executing treaties ratified by the United States with the advice and consent of the Senate. The argument made out here does not seek to challenge that. Rather, this article argues that international human rights law is an appropriate source of persuasive authority that ought to be pleaded in cases of constitutional rights interpretation. This might ensure that, to the extent possible within the text and structure of the Constitution itself, rights afforded constitutional

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United States position relating to international law *generally*, including reflections on international law, see the thoughtful and careful analysis in David Bederman, *Globalization, International Law and United States Foreign Policy* 50 EMORY LAW JOURNAL 717 (2001).

<sup>4</sup> See, for example, Thomas Hughes, *The Twilight of Internationalism* 61 FOREIGN AFFAIRS 25 (1985-86) (tracing the growth of anti-internationalist sentiment in the United States); Alison Dundes Renteln, *Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child* 3 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 629 (1996-97) (noting the "anti-international attitude which seems prevalent in [the United States] in the 1990s" at 636).

<sup>5</sup> See, for example, ERIC POSNER & JACK GOLDSMITH, *THE LIMITS OF INTERNATIONAL LAW* (2006) (on international law generally); John O. McGuinness & Ilya Somin, *Democracy and Human Rights Law* 84 NOTRE DAME LAW REVIEW 1739 (2009); John O. McGuinness & Ilya Somin, *Should International Law be Part of Our Law?* 59 STANFORD LAW REVIEW 1175 (2007)

protection are harmonious with international human rights law in terms of content and scope. International human rights law, then, is presented as an interpretive aid in domestic rights interpretation, application and enforcement.

The first part of this article expands on the appropriate relationship between international and domestic rights law and argues that it is one of synergy rather than one of superiority or inferiority. Far from the myriad adjudicatory bodies that have appeared in international human rights law representing some kind of strong-arm measures by international law, their admissibility rules in particular show that the desired state of affairs is one in which rights are effectively protected in the domestic sphere without any recourse to the international legal machinery. The article then goes on to illustrate the type of synergistic relationship that is possible between domestic and international rights-protecting law by means of the example of LGBT rights in Europe. In several different areas of LGBT rights activism and advocacy, litigants found it necessary to bring their cases to the European Court of Human Rights,<sup>6</sup> based in Strasbourg. These cases were brought for the purposes of resolving whether domestic laws, by which sexual and gender minorities were differentially treated, were permissible under the European Convention on Human Rights.<sup>7</sup> What is important about these cases, from the perspective of this article, is that they frequently involved the Court in using synergistic decision-making processes such as 'European consensus' in adjudicating on the complaints before them.

Having established the possibility of a synergistic relationship between international and domestic human rights law in the second part of the article and the desirability and appropriateness of such a relationship in the first part, the third part of this article goes on to consider whether such a relationship is possible or appropriate in the United States given the constitutional position of international law. In this Part, I argue that although there are some *prima facie* structural impediments to the use of international human rights law in constitutional rights adjudication, these impediments are not insurmountable. However, successfully overcoming them requires a

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<sup>6</sup> This is the court that adjudicates on individual and inter-state complaints under the European Convention on Human Rights as well as providing advisory opinions on the rare occasions in which the Council of Europe requests same. For an overview of the history and operation of the European Court of Human Rights and its organisational home—the Council of Europe—see DAVID HARRIS, MICHAEL O'BOYLE, ED BATES & CARLA BUCKLEY, HARRIS, O'BOYLE & WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, (2<sup>nd</sup> ed., 2009), Chapter 1.

<sup>7</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953

particular attitudinal approach to international human rights law that may require acculturation.

## 2. PART I: SYNERGY OR SUPERIORITY

When the Universal Declaration of Human Rights<sup>8</sup> was signed in 1948 few people could have foreseen the immense development of international human rights law that would emerge over the next sixty years. In this short period of time we have seen international human rights law progress from a set of normative statements, purely declaratory in manner (at least at the outset<sup>9</sup>) to a plethora of binding international instruments (both universal,<sup>10</sup> regional<sup>11</sup> and organisational<sup>12</sup>); human rights clauses in Security Council Chapter VII Resolutions;<sup>13</sup> human rights tie-ins in regional trade agreements;<sup>14</sup> and international adjudicatory bodies with jurisdiction over treaty-based rights claims. These international adjudicatory bodies range from courts with jurisdiction over individual and inter-state complaints to treaty-specific committees, many of which also have the capacity to hear and adjudicate upon individual complaints.

<sup>8</sup> G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

<sup>9</sup> On the influence of the Universal Declaration of Human Rights on the development of international human rights law see Juan E. Mendez, *Anniversary Contributions: International Human Rights Law: 60<sup>th</sup> Anniversary of the UDHR* 30 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 1157 (2009)

<sup>10</sup> Universal human rights law instruments are both general and specific. The general human rights law instruments making up what is known as the International Bill of Rights are the International Covenant on Civil and Political Rights (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976) and the International Covenant on Economic, Social and Cultural Rights (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976). There are also specific universal human rights instruments such as, although not limited to, the Convention on the Elimination of All Forms of Discrimination against Women (G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981) and the UN Convention on the Rights of the Child (G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990).

<sup>11</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 7; Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978; African [Banjul] Charter on Human and Peoples' Rights adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986; Arab Charter on Human Rights September 15, 1994, *reprinted in* 18 Hum. Rts. L.J. 151 (1997).

<sup>12</sup> Charter of Fundamental Rights of the European Union 2000 O.J. (C 364) 1 (Dec. 7, 2000).

<sup>13</sup> See, for example, Operative Paragraph 6, Security Council Resolution 1456 (2003) providing that "[s]tates must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".

<sup>14</sup> See generally FREDERICK ABBOTT, *INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES* (2006).

The development of these international adjudicatory bodies is a clear recognition of the need for rights not only to be enshrined in international instruments but also to be *effectively* protected.<sup>15</sup> In this context, it is abundantly clear that international human rights law's preference is for effective protection to take place on the domestic level—international adjudicatory bodies are intended and designed to play a supplementary and complementary role. This is most clearly demonstrated by the admissibility requirement in almost all of these international bodies that a complainant would have exhausted all domestic remedies (or have no reasonable prospect of success in domestic law) before going to the international sphere for resolution.<sup>16</sup> The subsidiary nature of these adjudicatory bodies' jurisdictions reflects the nature of the ideal relationship between international and domestic human rights protection as both a reflective *and* a synergistic one. International human rights law ought to *reflect* common values and fundamental principles (or at least, those that might have been said to have been common and fundamental to the predominantly western states involved in the emergence of international human rights law<sup>17</sup>) *and* to offer an interlocutor with which domestic human rights (or 'civil liberties') law can converse towards an advantageous outcome. Indeed, it is the reflectiveness of international human rights law that makes it appropriate as a synergistic partner to domestic constitutional law in liberal legalistic constitutional orders such as that found in the United States.

At their cores, both international human rights law and domestic constitutional law are built on a common dignitary core of individual liberty

<sup>15</sup> A commitment to effective protection of rights is a clear priority of international human rights courts in particular. See, for example, *Soering v United Kingdom* (1989) 11 EHRR 439.

<sup>16</sup> Article 41, International Covenant on Civil and Political Rights, *supra* note 10; Article 5(2), Optional Protocol to the International Covenant on Civil and Political Rights (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976); Article 35(1), European Convention on Human Rights, *supra* note 7; Article 46(1), American Convention on Human Rights, *supra* note 11; Article 6(2), Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights (June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III)) (providing that admissibility is to be decided on the basis of the same terms as laid down in Article 56 of the African [Banjul] Charter of Human and Peoples' Rights (*supra* note 11))—Article 56(5) requires complaints only to be sent after "exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged").

<sup>17</sup> That the 'international community' as it existed at the time of the foundation of the United Nations was dominated by western states is well accepted and indeed presents some difficulties in terms of using the nomenclature 'international community'. It is used in this article to describe the fora, organisations, law-making bodies and interactions of states in relatively formalised multilateral contexts. For more on the problematic nature of the term 'international community' see, for example, Diane Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference* 5 SOCIAL AND LEGAL STUDIES 337-364 (1996)

and restriction of state activities.<sup>18</sup> In both systems—particularly in relation to civil and political rights, which historically have more traction in most domestic jurisdictions<sup>19</sup>—human rights or civil liberties law is designed to ensure that the state may interfere with one's actions only inasmuch as that interference is necessary, proportionate, and objectively justifiable. When boiled down to this core constitutionalist value, we can see that domestic and international rights standards that may, at first glance, appear to be 'different' to one another are in fact more similar than might have been thought and are capable of synergistic existence. Domestic standards and actions can influence international conceptions of rights-content and the acceptability of state actions and vice-versa. It therefore makes immense common sense for the jurisprudence of domestic and international courts and other adjudicatory bodies to inform each other's activities in interpreting the scope and content of relevant rights protections.

These authorities would not be binding precedents, but persuasive ones. In this way, international human rights law can play its logical catalytic role whereby the articulation, application and giving effect to of rights in international law may catalyse an upwards harmonisation of rights between the domestic and international sphere. Domestic constitutional and other rights-protecting standards can be invigorated by international human rights law, and international human rights law can evolve by reference to domestic standards in general with international adjudicatory bodies attempting to recognise 'tipping points' based on state practice as well as on principle and clearly articulated treaty-based standards.

Such an approach to international human rights law is particularly apposite in situations where domestic courts are grappling with the meaning of constitutional standards in their contemporary context. While the 'list' of legally protected rights in either international human rights law treaties or constitutional documents is generally static (apart from in cases of amendment of the core document), the content of those rights is not necessarily static. Indeed, it is arguable that in order for constitutions to

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<sup>18</sup> For a masterful overview of the concept of dignity in the evolution of individual rights both domestically and internationally, including consideration of the limited nature of dignity and rights at the outset of the American Constitution (especially in relation to women, slaves and Native Americans) see JACK DONNELLY, HUMAN DIGNITY AND HUMAN RIGHTS, *Swiss Initiative to Commemorate the 60<sup>th</sup> Anniversary of the UDHR*, (2009), available at [http://www.udhr60.ch/report/donnelly-HumanDignity\\_0609.pdf](http://www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf) (last accessed: November 25, 2009).

<sup>19</sup> Economic and social rights tend to face serious difficulties in terms of justiciability and enforceability in domestic jurisdictions. See, for example, Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law* 22 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 35 (2006-2007)

remain 'fit for purpose' the content of the protected rights must evolve over time. Thus, for example, the right to privacy may be one that is constantly protected but its content may change over time: does it, for example, include a right for celebrities to be free from invasive media coverage even if there is a public appetite for such coverage?<sup>20</sup> Does it include a right for our private, adult and consensual sexual activity to be free from state interference even if some people find such activity morally abhorrent?<sup>21</sup> These questions may not have been in the minds of the drafters of constitutions and international instruments but they are questions of considerable contemporary importance that our human and civil rights law must address unless it is to become entirely detached from the real-life challenges that people face.

In trying to reach conclusions on whether or not our rights-protecting legal standards protect individuals in circumstances of this kind, a court ought to have recourse to a wide variety of sources including—I argue—international human rights law (where the decision is being made by a domestic court) and comparative constitutional law and state practice (where the decision is being made by an international adjudicatory body). In this way, both bodies of law can aid the evolution of the other. Indeed, as the next part of this Article shows, such a synergistic and catalytic relationship between domestic and international law is possible and has actually been evident in relation to sexual and gender rights in the Council of Europe, where the European Court of Human Rights has made considerable use of its 'consensus' approach to its interpretation of the right to privacy in the European Convention on Human Rights when faced with questions of sexual and gender identity.

### 3. PART II: LGBT RIGHTS IN (WESTERN) EUROPE

Article 8 of the European Convention on Human Rights protects the right to respect for, *inter alia*, one's private and family life. It has loomed large in the rich vein of jurisprudence on lesbian, gay, bisexual and transsexual (LGBT) rights produced by the European Court of Human Rights. Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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<sup>20</sup> For a story of such evolution see Gavin Phillipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act 66* MODERN LAW REVIEW 726 (2003) and the House of Lords decision in *Campbell (Appellant) v. MGN Limited (Respondents)* [2004] UKHL 22

<sup>21</sup> The Irish Supreme Court originally held that, in constitutional terms, it did not: *Norris v Attorney General* [1984] IR 36. The European Court of Human Rights, however, held that in ECHR terms it did: *Norris v Ireland* (1988) 13 EHRR 186.



2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The right to private life has been used to challenge laws that criminalise homosexual sex and allow sexual orientation to be used as a bar to certain institutions or employment. Building on what has been a very expansive interpretation of the right to privacy within Article 8 is the right to family life, the Court's interpretation of "family" has been a channel through which many LGBT rights campaigners have aimed to acquire recognition and protection for their family forms regardless of marital status. As a result of Article 8 the State is precluded from exposing private aspects of one's life and *also* fixed with a positive obligation not to obstruct one from choosing to express certain intimate aspects of one's life. It is not, however, the case that the State may not interfere in one's Article 8 rights *at all*. Article 8.2 specifically outlines the circumstances in which the state may legitimately interfere with the rights of the individual. Legitimate interference requires three elements:

1. Legal interference (*i.e.* the interference has the quality of law and was introduced through legal measures);
2. Necessity (*i.e.* the interference was necessary for the purposes of one of the heads included in Article 8.2 – national security, public safety, national well-being, public order, the protection of health and morals and the protection of the rights and freedoms of others);
3. Proportionality (*i.e.* the measures taken in order to secure one of the heads included in Article 8.2 were proportionate inasmuch as they are directed towards that necessity and do not overly infringe on the rights of individuals)

The jurisprudence on LGBT rights and Article 8 is important from this perspective because it illustrates the capacity for domestic and international rights law to have a synergistic relationship. As will be illustrated in the brief survey of some relevant jurisprudence that follows, the European Court of Human Rights has afforded states a margin of appreciation in relation to LGBT rights where appropriate but, once it has identified a tipping point by reference in particular to the legal and social conditions in nation states, it has narrowed that margin of appreciation to naught thereby requiring member

states to amend their domestic law in line with the Court's interpretation of the Convention or risk being in breach of their international obligations.

The first 'battleground' in LGBT rights litigation under the European Convention was the right to privacy and criminalisation of homosexuality. It has long been clear that 'privacy' as defined within Article 8 covers an individual's physical and moral integrity, including one's sexual life.<sup>22</sup> The first major case in this relation was *Dudgeon v United Kingdom*.<sup>23</sup> Dudgeon claimed that the criminalisation of consensual anal sex in Northern Ireland infringed on his right to privacy as a homosexual man, whereas the United Kingdom claimed that it had a large margin of appreciation (*i.e.* discretion) in situations where the protection of morals were concerned. Furthermore the UK submitted that the majority of people in Northern Ireland found male homosexuality morally unacceptable and feared that repealing this law would lead to deterioration in moral standards. On that basis the UK claimed that maintaining criminalisation for such acts was necessary, proportionate and within their rights.

While accepting that member states did have a broad margin of appreciation in issues of public morality the Court held that "[a]s compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of consensual homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question" as criminal.<sup>24</sup> In addition the Court held that even if an argument could be made in favour of such legislation the detrimental effects it would have on people's capacities to choose how they lived their lives outweighed any such considerations. As a result the legislation was deemed inconsistent with Article 8 and, subsequently, repealed by the UK government.

One of only four dissenting judgments in *Dudgeon* was that of (Irish judge) Justice Walsh, whose judgment concentrated on whether the law had any business delving into issues of personal morality at all. Having concluded that if the State has a legitimate interest in trying to ensure "the prevention of corruption and ... the preservation of the moral ethos of its society"<sup>25</sup> then it may legislate for personal morality, Walsh J. went on to consider the particular role of religion and morality in Northern Ireland. He held that

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<sup>22</sup> *X & Y v The Netherlands* (1985) 8 EHRR 235.

<sup>23</sup> (1981) 4 EHRR 149.

<sup>24</sup> *Id.*, para. 60

<sup>25</sup> *Id.*, Judgment of Walsh J., para. 14

“[r]eligious beliefs in Northern Ireland are very firmly held and directly influence the views and outlook of the vast majority of persons in Northern Ireland on questions of sexual morality. In so far as male homosexuality is concerned, and particularly sodomy, this attitude to sexual morality may appear to set the people of Northern Ireland apart from many people in other communities in Europe, but whether that fact constitutes a failing is, to say the least, debatable”.<sup>26</sup> He concluded that there had been no breach of Article 8 and that the UK government was entitled to maintain the criminalisation legislation if it believes that decriminalisation would “have a damaging effect on moral attitudes”.<sup>27</sup>

Given this approach from the Irish judge in Strasbourg it should, perhaps, have come as no surprise that the Irish government failed to decriminalise homosexuality despite the fact that it appeared to clearly contravene the European Convention as per *Dudgeon*. David Norris’ claim that the same legislation as impugned in *Dudgeon* was unconstitutional on the basis of, *inter alia*, the right to privacy had been rejected by the Irish Supreme Court in 1984.<sup>28</sup> In the course of that judgment O’Higgins CJ (as he then was) held that, through the references to God in the Preamble to the Irish Constitution,<sup>29</sup> the Irish people were “asserting and acknowledging their obligation to Our Divine Lord Jesus Christ...proclaiming a deep religious conviction and faith...with Christian beliefs” and that, as a result, any suggestion that the Constitution allowed for “unnatural sexual conduct which Christian teaching held to be gravely sinful” was clearly inaccurate. The clear role that Christian concepts of morality played in this Supreme Court decision was also evident in the Irish government’s submissions to the European Court

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<sup>26</sup> *Id.*, para. 17

<sup>27</sup> *Id.*, para. 20

<sup>28</sup> *Norris v Attorney General* [1984] IR 36

<sup>29</sup> The Preamble reads:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,  
We the people of Eire,  
Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,  
Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,  
And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,  
Do hereby adopt, enact and give to ourselves this Constitution.

of Human Rights in this case, where the State argued that “[w]ithin broad parameters the moral fibre of a democratic nation is a matter for its own institutions”.<sup>30</sup> The Court, however, rejected this claim on the grounds that it would lead to “unfettered”<sup>31</sup> state discretion in the field of morality.

Much the same decision was reached against Cyprus in 1993<sup>32</sup> and it is now clear that any laws criminalising consensual homosexual activity will violate Article 8, although consensual heavy sado-masochistic activity between homosexuals appears not to enjoy Article 8 protection.<sup>33</sup>

This strong statement on the part of the Strasbourg court on moral regulation and homosexuality led to further litigation claiming that excluding LGBTs from certain institutions or employments on the basis of their homosexuality is also a violation of the right to privacy under Article 8. Successful litigation was then taken in relation to gays in the military. One of the first such cases was *Lustig-Praen & Beckett v United Kingdom*<sup>34</sup> involving soldiers who had been dismissed from the Royal Navy as a result of their homosexuality. In relation to the second applicant, Beckett, not only had he been dismissed for being gay but the nature of the investigation leading to his dismissal had been abusive. For example he was asked whether he had bought pornography, whether he had been abused as a child, whether he was “the butch or the bitch” on the occasion of his first intercourse with his current partner, whether he used condoms and sex aids, whether he had sex in public, whether his parents knew of his sexual orientation and what kind of bars he frequented.<sup>35</sup> At the time of the case the military was governed by, *inter alia*, the Armed Forces’ Policy and Guidelines on Homosexuality as updated by the Criminal Justice and Public Order Act 1994. The Guidelines provided that homosexuality was “incompatible with service in the armed forces” because of the close living conditions and because “homosexual behaviour can cause offence, polarise relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness”. Arguments of this nature formed part of the UK’s submissions claiming no violation of Article 8.

Firstly, the Court found that investigations into the applicants’ homosexuality and, in particular, interviews with the applicants and with third parties as to their sexual orientation and practices constituted a direct interference with their rights to privacy. As a result, their consequent

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<sup>30</sup> JANIS, KAY & BRADLEY, *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS*, (2<sup>nd</sup> ed., 2000), 282

<sup>31</sup> *Norris v Ireland* (1988) 13 EHRR 186.

<sup>32</sup> *Modinos v Cyprus* (1993) 16 EHRR 485

<sup>33</sup> *Laskey, Jaggard & Brown v United Kingdom* (1997) 24 EHRR 39.

<sup>34</sup> Judgment, 27 September 1999 (Applications 3147/96 and 322377/96)

<sup>35</sup> *Id*, para. 19

dismissal from the armed forces violated Article 8. While the UK government accepted that the actions might be deemed violatory they claimed that they were allowable under Article 8.2 of the Convention based on the legitimate aim of maintaining morale among military personnel and, as a result, of ensuring the fighting power and effectiveness of the armed forces. The government further argued that they were entitled to a large margin of appreciation in this issue given the divisiveness of the issue in the UK and the special military context. The government strongly refuted any suggestion of homophobia, claiming instead that the concerns grounding the policy were genuinely held and based on the experiences of those accustomed to the pressures of service life. On the contrary the applicants claimed that the policy was based on simple prejudice.

The court accepted that states had a right to impose restrictions on individual rights where they jeopardised the effectiveness of the armed forces, but that such threats to operational effectiveness had to be substantiated by reference to specific examples.<sup>36</sup> In considering whether sufficient reasons existed to believe that homosexuals in the armed forces would deplete morale the Court found that “the perceived problems which were identified in [a relevant] report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation”<sup>37</sup> and that to the extent that they represented “a predisposed bias”<sup>38</sup> towards homosexuals they could not be taken to justify violations of Article 8 rights. Rather the Court felt that codes of conduct should be introduced, analogous to those introduced in relation to service members of colour and women in the military. On the basis that no objective and rational justification had been advanced to justify the Article 8 violation the Court held that the Convention did not permit dismissal from the armed forces on the basis of sexual orientation and the UK did not have a wide enough margin of appreciation to perpetuate this policy.<sup>39</sup>

In addition the right to privacy within Article 8 has been used to base claims relating to unequal ages of consent for homosexual and heterosexual sexual activity. In *L & V v Austria*<sup>40</sup> the Court considered whether different ages of consent for heterosexual and homosexual sex were a violation of the right to privacy in Article 8. The applicant had been convicted of illegal

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<sup>36</sup> *Id*, para 82

<sup>37</sup> *Id*, para 89

<sup>38</sup> *Id*, para. 90

<sup>39</sup> The same result was reached in *Smith & Grady v United Kingdom* (1999) 29 EHRR 493 and *Beck, Copp & Bazeley v United Kingdom* [2002] ECHR 679

<sup>40</sup> (2003) 36 EHRR 55

homosexual sex having had oral sex with a fifteen-year-old and claimed that the fact that he would not have committed any criminal offence had he done so with a female partner was a violation of his Article 8 rights. He also presented a broader social argument that suggested that the law as it stood implied that younger people required more protection as against adults in homosexual relations than in heterosexual relations. This, he submitted, hampered gay teenagers in developing their sexual identities and attached “a social stigma to their relationships with adult men and to their sexual orientation in general”.<sup>41</sup>

Significantly the Court held that although there were previous cases from the Commission that allowed differential ages of consent the Convention itself was “a living instrument, which has to be interpreted in the light of present-day conditions.”<sup>42</sup> Given the fact that most Convention member states had equalized their ages of consent, a differential age of consent must be capable of objective and reasonable justification in order to avoid violating the Convention. The criminalization of the complainant on the basis of differential ages of consent was therefore found to be in violation of Article 8.

The European Court of Human Rights has also established that the right to privacy includes a right to identity. The main issue faced by the Court, however, has been the extent to which a State is obliged to recognise one’s identity, particularly where someone has undergone gender realignment surgery. Most of the cases taken in relation to identity and privacy concern the birth certificate and whether or not a state is required to put in place a mechanism for amendment of the birth certificate following gender realignment. This issue can cause particular difficulties as, in general, birth certificates are records of historical fact *i.e.* they are designed to record facts as of the time of birth. In order to assess gender at the time of birth, purely biological criterion tends to be applied and even then this tends to be based on visual indicators of gender. Where it emerges that those biological criterion did not accurately reflect one’s gender many people seek amendment of the birth certificate, but as the certificate is an historical record states often claim that it should not be changed.

In *Rees v United Kingdom*,<sup>43</sup> a case concerning a post-operative female-to-male complainant, the Court stressed the lack of consensus among the Council of Europe states as regards the means by which a state should give effect to one’s right to respect for their private life and identity. In fact the

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<sup>41</sup> *Id.*, para. 38

<sup>42</sup> *Id.*, para. 47

<sup>43</sup> [1986] ECHR 11

Court held that the law was going through “a transitional stage” in this respect and, as a result, that States enjoyed a very wide margin of appreciation in this respect.<sup>44</sup> As it stood transsexuals in the UK were in a position to change their name by deed poll and to have that change recognised on a number of official documents, including passports. By indicating one’s preferred prefix the Court felt that this procedure went some way towards affording respect to one’s Article 8 rights. Despite this, however, there were certain situations in which a resident in the UK was required to use the unchangeable birth certificate in order to confirm their identity, which caused considerable embarrassment, shame and hurt for the applicant. This notwithstanding the Court felt that amending a birth certificate would constitute falsification of facts at the time of birth and that where, as in the UK, there were some schemes in place by which realigned gender can be recognised requiring the state to amend a birth certificate would be extending the state’s obligations too far. This decision was based to a large extent on the margin of appreciation of the state and the lack of legal, psychological, medical and scientific consensus extant at the time.

*Rees* was quickly followed by *Cossey v United Kingdom*,<sup>45</sup> which concerned a post-operative male-to-female complainant. Once again the complainant alleged that the UK’s failure to allow for amendment of a birth certificate was a violation of Cossey’s Article 8 privacy rights. The Court did not depart from its *Rees* decision as a result of the fact that it felt the decision remained in-line with current societal conditions. The State’s margin of appreciation, therefore, remained wide: it was clear that one’s identity must be recognised but the means by which it would be recognised and respected could differ from state to state. In the later case of *Sheffield & Horsham v United Kingdom*<sup>46</sup> the Court upheld those earlier decision but significantly did ‘scold’ the UK for not having advanced the means of recognition and respect since the *Rees* and *Cossey* judgments.

The first case in which an applicant successfully used Article 8 to oblige the state to extend official recognition of realigned gender was *B v France*.<sup>47</sup> In France the applicant was strictly confined in terms of choice of name and gender was encoded in a personal identity number which was required for a variety of interactions with government and private entities. As a result of this, and because the sophisticated French system of recording personal identity would require only minor changes, the Court found that

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<sup>44</sup> *Id*, para. 37

<sup>45</sup> [1990] ECHR 21

<sup>46</sup> [1998] 27 EHRR 163

<sup>47</sup> [1992] 16 EHRR 1

France was required to recognise the applicant's gender. Interestingly, this decision was not based on the state's margin of appreciation or on changes in common consensus; rather it was based on the specific circumstances within France and implications for the applicant. *B* was not, therefore, in conflict with the earlier decisions in *Rees*, *Cossey* and *Sheffield*.

It was not until *Goodwin v United Kingdom*<sup>48</sup> that the Strasbourg court substantially changed its stance in this relation. Christine Goodwin was a post-operative male-to-female transsexual who sought, *inter alia*, to have her birth certificate amended to reflect her realigned gender. Goodwin noted particularly that the UK government had failed to take appropriate steps to respect her identity despite the Court's advice in previous cases to keep the law under review and in line with changes in comparative law. She stressed the rapid changes in scientific understanding of and social attitudes towards transsexuals and complained that these were not matched by legal reform. In particular she stressed the various laws that disadvantaged transsexuals who could not amend their birth certificate and the significant distress and hurt caused in one's every day life as a result of such laws and social conditions. The respondent government submitted that as there was no generally agreed or accepted approach among the member states in relation to transsexuals the UK enjoyed a wide margin of appreciation in this matter and did not violate Article 8.

In its assessment of the merits the Strasbourg Court held that in order to be effective the Convention must have regard to the changing conditions within individual states and the members states generally and, as a result, that it was not strictly bound to follow the judgments starting with *Rees*. The Court particularly found that there was an inconsistency in English law whereby gender realignment surgery could be carried out by the National Health Service, which therefore recognises transsexualism, but on the other hand this realigned gender was not fully recognised by the state. The Court noted significant growth in knowledge and understanding of transsexualism and held that there was no scientific argument against legal recognition of realigned gender. The Court found that only four member states (including the United Kingdom) had no mechanism of legal recognition following gender realignment and was influenced by the emerging international consensus on this issue. All of this combined indicated that an international legal, social, scientific, psychological and medical consensus on transsexualism was emerging. Given all of the above, and given the existence of a number of law reform proposals for legal recognition within the UK itself, the Court held that

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<sup>48</sup> [2002] 35 EHRR 18



there had been a reduction in the state's margin of appreciation and, as a result, a violation of Christine Goodwin's Article 8 rights.

This short and selective survey of the European Court of Human Rights' approach to LGBT rights illustrates the type of synergistic relationship that is possible between international and domestic human rights law. Where appropriate, the Court used the margin of appreciation to allow states some discretion in how to approach LGBT rights but where a tipping point could be identified—based largely on emergent practice in other states—the Court issued clear interpretations of the content and scope of the right to privacy as it related to LGBT rights and dramatically reduced the margin of appreciation. The margin of appreciation is a key concept within ECHR law and gives states discretion in questions of particular sensitivity. Importantly, however, the margin of appreciation does not constitute a *carte blanche* for states to do as they wish. As a consensus emerges, particularly on issues of sensitivity or issues in relation to which the law may be in a transitional stage, the margin will become narrower until it is no longer acceptable for a state to operate in a manner inconsistent with the convention rights as given effect by common European practice. The margin of appreciation therefore decreases in size as consensus increases. By corollary, as the margin decreases the obligation on states to amend their domestic law to recognise changing consensus increases even before a *de jure* obligation arises through a bright-line judgment of the Court clarifying that a Convention provision can now be said to protect certain behaviours under the rubric of privacy. In addition, the narrower the margin and greater the consensus the more weighty the jurisprudence of the Court can be as an interpretive aid in domestic proceedings where analogous questions—as to whether, for example, constitutional privacy rights include a right to have one's realigned gender recognised in law—are at bar.

#### 4. PART III: INTERNATIONAL HUMAN RIGHTS LAW AND US CONSTITUTIONAL LAW

Some readers will understandably question the use of European human rights law to illustrate the capacity for synergy between international and domestic human rights law in the United States. Are there not, it might be asked, serious and perhaps even insurmountable structural and other obstacles to the similar use of international human rights law in the United States? To be sure there are some differences that have to be considered, but in my view none of these are insurmountable.

Firstly it must be acknowledged that, through their ratification of the European Convention on Human Rights, all member states have accepted that

the decisions of the Court to which they are party are binding upon them in international law.<sup>49</sup> This creates an international compulsion to change domestic law where inconsistency has been discerned by the European Court of Human Rights itself. This international obligation, together with the reputational and potentially other sanctions that might flow from a failure to implement the judgment, certainly has the potential to impact on the extent to which states who are party to particular litigation react to it. However, other states—i.e. those that were not parties to the particular litigation—do not have the same obligation. Nevertheless the potential for the Court to find other states in breach of the Convention in comparable cases (as happened, for example, in *Norris v Ireland* in the wake of *Dudgeon v United Kingdom* considered above) might well be a motivating factor. In cases where there is margin of appreciation left to states in relation to what the Convention requires there may also be a temptation not to implement domestic legal changes in response to European Court of Human Rights decisions dealing with other states. Even then, however, the Court's commitment to evolutive and dynamic interpretation of the Convention with a view to effective rights protection may dissuade states from dragging their heels to too great an extent. The structure of the European Convention on Human Rights and standing of the Court's decisions within that structure may, then, be an element that ought to be taken into account in explaining or reading the LGBT rights example laid out above.<sup>50</sup>

The United States, in contrast, does not tend to become party to individual complaints mechanisms in international human rights law.<sup>51</sup> There is,

<sup>49</sup> Article 46(1), European Convention on Human Rights (*supra* note 7).

<sup>50</sup> For a concise description of this structure and of enforcement mechanisms see FIONA DE LONDRAS & CLIONA KELLY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT: OPERATION, IMPACT AND ANALYSIS* (2010), 133-141

<sup>51</sup> The United States has failed to engage with any of the primary complaints mechanisms in international human rights law. Under the First Optional Protocol to the International Covenant on Civil and Political Rights (*supra* note 16) the Human Rights Committee may hear an individual complaint against a state; however the United States has not ratified the Protocol. Under the Convention on the Elimination of all forms of Discrimination against Women (*supra* note 10) similar petitions may be heard under the First Optional Protocol (G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), *entered into force* Dec. 22, 2000); however the United States has failed to ratify this treaty despite signing it on 17 July 1980. Under the UN Convention against Torture (G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987) individual complaints can be heard if the state party has made a declaration to this effect under Article 22; the United States has failed to make any such declaration. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), *entered into force* 1 July 2003) also allows for an individual complaint mechanism, which will come into effect once ten states have made the necessary declaration under Article 77; the United States has neither signed nor ratified this Convention.

then, perhaps a different level of obligation when it comes to the decisions of such institutions relating to individual complaints against other states. However, even though—for example—the United States is not subject to the individual complaints mechanism of the Human Rights Committee under the International Covenant on Civil and Political Rights, it is still a party to the Covenant itself and therefore still has an international legal obligation under that Covenant. The decisions of the Human Rights Committee can touch on and elucidate the content and scope of rights within that Covenant and therefore be relevant to the United States. In the periodic reports submitted by the US, compliance with the Covenant will be judged by reference to its meaning as articulated in, *inter alia*, individual complaints decisions of the Committee. Therefore there is an obligation—albeit perhaps an obtuse one—to comply with these decisions where they are generalisable beyond the specific facts of individual disputes. Complying with that obligation can require changes to domestic law and, indeed, compliance—in the sense of upwards harmonisation of rights protecting standards—can incorporate the interpretation of constitutional civil rights by reference to, *inter alia*, international human rights standards as articulated by international human rights adjudicatory bodies. The synergistic relationship between the two is not limited to scenarios where the judgments or decisions of those adjudicatory bodies are binding *stricto sensu* on the individual state.

The second comment that might be made about the appropriateness of the European example to the United States is the alleged difference in the relevance of international law to monist and dualist states. With the exception of the United Kingdom and Ireland, all of the state parties to the European Convention on Human Rights have monist legal systems broadly defined. This means—again at a necessary level of generalisation—that international law ratified by the state is said to flow directly and without barrier into the domestic law of the ratifying state and is therefore subject to be pleaded in domestic proceedings. The United Kingdom and Ireland are, in contrast, dualist states<sup>52</sup> where—up until 1998 and 2003 respectively—the European Convention on Human Rights had not been expressly incorporated.<sup>53</sup> However, as I have written elsewhere, dualism and anti-internationalism are not necessary bedfellows.<sup>54</sup> In fact, I argue that among dualist jurisdictions there is a spec-

<sup>52</sup> On the United Kingdom see *Buvot v Barbu* (1737) Talb. 281; *Triquet v Bath* (1764) 3 Burr. 1478. On Ireland see Article 29.6, *Bunreacht na hÉireann* (Constitution of Ireland) (1937).

<sup>53</sup> Incorporation took place in the United Kingdom by means of the Human Rights Act 1998 and in Ireland (at a sub-constitutional level) by means of the European Convention on Human Rights Act 2003. On the Human Rights Act 1998 see DAVID HOFFMAN & JOHN ROWE, *HUMAN RIGHTS IN THE UK: AN INTRODUCTION TO THE HUMAN RIGHTS ACT 1998* (2006); on the European Convention on Human Rights Act 2003 see FIONA DE LONDRA & CLIONA KELLY, *supra* note 50.

<sup>54</sup> Fiona de Londras, *supra* note 3.

trum of internationalisation relating to unincorporated international law.<sup>55</sup> Thus, in some dualist states judges in the superior courts are quite willing to have recourse to international human rights law in the course of constitutional interpretation—this is quite evident in South Africa where the Constitution expressly calls for such attention to be paid to international human rights law,<sup>56</sup> but such an express reference is not required. The United States Constitution provides for neither a strictly dualist nor a strictly monist system of dealing with international law. The Supremacy Clause provides for customary international law to be federal common law<sup>57</sup> and jurisprudential development has resulted in what are known as self-executing treaties being considered self-incorporating and non-self-executing treaties requiring express incorporation.<sup>58</sup> Incorporation of non-self-executing treaties makes those treaties binding in domestic law. This, of course, is relevant where one is attempting to assert a treaty-based right in domestic proceedings. However, the kind of synergistic relationship between international human rights law and domestic constitutional law envisaged by this author does not hinge on whether a piece of international law is binding domestically or not. In fact, it does not even hinge on whether the United States has ratified the particular piece of international law. It is, rather, concerned with the idea that international human rights law can and should be seen as a persuasive body of law relevant to constitutional interpretation of civil rights, particularly in relation to the content and scope of those civil rights in contemporary circumstances. When Kennedy J., for example, referred to the UN Convention on the Rights of the Child in *Roper v Simmons*<sup>59</sup> he was not claiming that the Convention was internationally binding on the United States (it is not as the US has not ratified it). Neither was he asserting the domestic justiciability of the Convention. Rather, Kennedy J. was using the Convention and the standards set down within it as a benchmark for the appropriate scope of children's rights in relation to punishment, which then could be applied in the process of constitu-

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<sup>55</sup> *Id.*

<sup>56</sup> South African Constitution § 39 (1) (b) (1996).

<sup>57</sup> Article VI, US Constitution as interpreted in *The Paquete Habana* 175 US 677 (1900), *per* Gray J., 700. It would be misleading to suggest this position is without controversy. Supporting the position see, for example, Harold Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States* 26 AMERICAN JOURNAL OF INTERNATIONAL LAW 280 (1932), 282-285 and Louis Henkin, *International Law as Law in the United States* 82 MICHIGAN LAW REVIEW 1555 (1984), 1555-1557. For a critical perspective on this position see, for example, Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position* 110 HARVARD LAW REVIEW 815 (1997).

<sup>58</sup> *Foster v Neil* 27 US 253 (1829). The position is reiterated in the Restatement (Third) of Foreign Relations Law: "Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation". § 111.3 (1986).

<sup>59</sup> 543 US 551 (2005).

tional interpretation. It is this kind of relationship that typifies the synergy possible between international and domestic human or civil rights law. The constitutional structures in the United States do not, I argue, serve as an insurmountable barrier to the use of international human rights law in constitutional interpretation and ought not, in my view, to be constructed as doing so.

Recognising the potential of international human rights law to be an effective and helpful persuasive source in constitutional interpretation requires a particular attitudinal approach to that body of law. Discussions of whether international or domestic law is ‘superior’ are deeply unhelpful in any attempt to ensure progression towards upwards harmonisation in rights protection and can arguably have the effect of hardening attitudes against international law among domestic law practitioners, educators and judges. When the common dignitary core of international and domestic rights standards considered in Part I above is recognised, and when the weighting given to unincorporated or un-ratified international human rights law is that of persuasive authority within a common law jurisdiction, any fears of international human rights law as interloper ought to be dispelled. Comparative constitutional law is not generally seen as an interloping body of law, after all.<sup>60</sup> The difference is, perhaps, that when making their decisions constitutional courts do not purport to be making universally applicable law to which other states are to be measured and, to some extent, international human rights law adjudicatory bodies might be said to. But those international bodies are making universally applicable law in the *international* sphere.

As a matter of *international* law a state may be obliged to ensure that its law and practice adheres to certain rights-based standards. The claim is not that this is the case as a matter of domestic law although, in practical terms, domestic law is likely to be examined for its compatibility with those international standards by those international bodies. Those international bodies are, however, assessing compatibility with international law and not with domestic constitutional law. In the process of constitutional interpretation, domestic superior courts such as the United States Supreme Court are (generally) assessing the compatibility of law or governmental action with domestic law unless international standards are said to be binding. A truly synergistic relationship between domestic and international human and civil rights law would see courts—where applicable—considering whether the scope and content of constitutional rights against which governmental action

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<sup>60</sup> This is not to say that all academics or judges approve of the use of comparative constitutional law in domestic constitutional litigation; they do not. However, this is not because of any claim that comparative constitutional law in some ‘trumps’ or is superior to domestic constitutional law.

is measured can and should be interpreted by reference to international human rights law (as well as other comparative sources).

## 5. CONCLUSION

Moving the discourse away from questions of superiority or inferiority of international and domestic human rights law in domestic litigation allows us to refocus debates on the appropriate use of international human rights law in domestic proceedings. This refocusing reminds us that, when used as an aid to constitutional interpretation, international human rights law can develop a synergy with domestic rights law (whether termed 'human rights' or 'civil rights' law) that enables the upwards harmonisation of these bodies of law so that domestic law protects individual rights effectively. International human rights laws' various adjudicatory bodies—such as regional courts and treaty-based committees—produce jurisprudence that can be particularly useful in interpreting the scope and content of rights in a contemporary and effective manner, taking into account developments in a range of states. This jurisprudence offers an obvious persuasive value to the United States Supreme Court when it is grappling with analogous questions to those international institutions, albeit in domestic contexts.

This is not to suggest that these international courts' and committees' decisions are binding on the United States: unless the US has accepted their jurisdictions then they are not, either as a matter of international or domestic law. However, non-binding decisions can offer guidance to superior courts in all jurisdictions. Where the basic value underlying the rights protecting provisions in the international and domestic sphere is analogous and essentially dignitary, the persuasive value of this international jurisprudence appears to be all the more obvious. Courts all over the world—both domestic and international—are constantly struggling with how to ensure that their basic texts are fit for purpose while not mutilating their meaning beyond clear literal and teleological grounds. Inter-institutional and inter-jurisdictional learning is both sensible from a common sense perspective and productive from the perspective of catalysing upwards harmonisation of rights protection. This has, as illustrated in Part II, happened and worked in the context of LGBT rights in the Council of Europe and, as argued in Part III, the structural differences between Europe and the United States are not so immense as to make a similar process possible and appropriate in relation to the US Constitution. Writing to Samuel Kercheval in 1816, Thomas Jefferson stated:

Some men look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preced-

ing age a wisdom more than human and suppose what they did to be beyond amendment. I knew that age well; I belonged to it and labored with it. It deserved well of its country. It was very like the present but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves were they to rise from the dead.

It seems difficult to disagree with the sentiment. Learning from experience—whether our own or that of others—and ensuring the contemporaneity of the fundamental guarantees of the Constitution, without eroding their substance and dignitary foundation, are naturally collative processes. International human rights law is another source that can and should be reached for in the process of interpreting domestic constitutional guarantees in the United States and, indeed, elsewhere.